59

(3)

No. 06-1464

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL J. O'CALLAGHAN, *Pro Se*,
and
ALISON E. CLAPP O'CALLAGHAN, *Pro Se*,

Petitioners,

v.

HOMAYOUN SHIRAZI, M.D.; *et al*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF

Daniel J. O'Callaghan
Alison E. Clapp O'Callaghan,
Petitioners Pro Se

c/o Daniel J. O'Callaghan, Esq.
7 Dey Street, Suite 700
New York, New York 10007
(212) 222-4200

TABLE OF CONTENTS

Page

Table of Authorities ii

I. Federal Pleadings/ Proceedings Support Grantof Writ . 3

II. Petitioners' Supplemental Complaint Meritorious: Real Damages Alleged 8

Conclusion 10

TABLE OF AUTHORITIES

Page

Cases

Alpern v. UtiliCorp United, Inc., 84 F. 3rd 1525 (8th Cir. 1996) 9

District of Columbia Court of Appeals v. Feldman, 460 U.S. 426 (1983) 3, 6, 8, 10

Doyle v. Household Cred. Servs., Inc., 844 F. Supp. 13 (D. Me. 1994) 9

Fielder v. Credit Acceptance Corporation, 10 F. Supp.2nd 1101 (W.D. Mo. 1998) 8

Johnson v. Crown Enterprises, Inc., 398 F. 3rd 339 (5th Cir. 2005) 10

Keith v. Volpe, 858 F. 2nd 467 (9th Cir. 1988) 9

Klos v. Haskell, 835 F. Supp. 710 (W.D.N.Y. 1993), *aff'd* 48 F. 3rd 81 (2nd Cir. 1995) 9

Maegdlin v. International Association of Machinists and Aerospace Workers, 309 F. 3rd 1051 (8th Cir. 2002) 10

Mayle v. Felix,__ U.S. __, 125 S. Ct. 2562 (2005) 10

Quarantino v. Tiffany & Co., 71 F. 3rd 58 (2nd Cir. 1995) 8

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 3, 6, 8, 10

Weeks v. New York, 273 F. 3rd 76 (2nd Cir. 2001) 9

Rules

Fed. R. Civ. Proc. R. 15 ..... 3, 9

Treatises

Wright & Miller § 1213 *Jurisdictional Amount* 9

PETITIONERS REPLY BRIEF

Petitioners address certain new points including Respondents' misstatements of fact and/ or law. Respectfully, in context of the Federal jurisdiction subject addressed concerning Petitioners' Federal pleadings, it appears appropriate that pleading excerpts herein be included.

In context of the facts and circumstances known to Petitioners upon Federal case commencement, *i.e.*, the absence of knowledge that Hortense's will already had been changed by BR&G, Corash, *et al.*, it was not appropriate for Petitioners to identify an *ad damnum* amount upon a premature "will contest". However, both Federal question jurisdiction and diversity jurisdiction were asserted by Petitioners in all filed Federal pleadings and all contended damages to be determined at trial by a jury. Petitioners address new points.

- "*Pollard objected to the Petition ...*" In reality, BR&G and Corash falsely represented authority as Hortense's "counsel". Astonishingly, not a single piece of paper was submitted by these attorneys – or anyone else -- which established such attorney-client relationship. More, not at any time -- and notwithstanding Petitioners' several requests -- did any State authority require submission of such "proof" of attorney authority on behalf of Hortense.

  Not at any time or under any circumstance did Hortense ever appear in public or in court and not at any time did Hortense submit any writing in any proceeding in which Hortense evidenced retention of BR&G and/or Corash as "counsel" or evidence that Hortense was knowledgeable concerning the proceedings or objected to the guardianship petition(s).[1]

---

[1] Respondents' effort to posit a "distant" relationship is belied by the actual facts: Co-Petitioner and sister (heirs) were raised in Springfield, Mass., where their father, Harrison Clapp, a Springfield

- Petitioners were not present at the April 9, 1998, proceeding and were not knowledgeable relating to the events of this proceeding nor provided consent to any event other than an order for temporary guardianship.

- At the June 1, 1999, trial, as there remained imposed legal impossibility for Petitioners to establish "incompetency", Petitioners sought a statutorily assured medical examination, *e.g.*, by Dr. Fleitman and Dr. K, so as to satisfy the *Medical Certificate Statute*. Judge Perlman testified as a witness pursuant to Judge Sacks' instructions. Judge Perlman's testimony was not "...adverse to the Petitioners' position" – other than as solicited by Judge Sacks, not the Petitioners -- nor did Petitioners "rest" their "case". *See infra.*

---

native/Amherst College graduate, was the Secretary of the Massachusetts Mutual Life Insurance Company. The sisters graduated from Mount Holyoke College and Smith College and maintained a lifelong loving relationship with Hortense.

Hortense was the 2nd daughter of Alvin Clapp, the brother of Arthur Clapp, Co-Petitioner's grandfather, who was a graduate of Amherst College and Harvard Medical School.

Upon Arthur Clapp's untimely death, Alvin Clapp helped raise the then 5-year old Harrison Clapp. The Clapp families remained close, particularly in the Northampton home which Alvin had built in/ about 1896 – which Hortense maintained for the Clapp family.

Hortense resided in this home her entire life, including for many years with her older sister, who married Ralph Pollard. Through Hortense's 60th year, Hortense remained unmarried. Then, subsequent to her sister's death, Hortense at age 61 married Ralph Pollard who had remained in the Clapp home. Several years subsequent to Ralph Pollard's death, Schroder/ Brandt and Rev. Ives/ First Churches began their campaign for control of Hortense and her assets. The Respondents' insistence for "*Pollard*" is misrepresentative of the Clapp families' continuity in Northampton.

- The district court did not hold a "hearing" on 5.27.99, rather, *oral argument*. Petitioners' statement that no "*Rooker-Feldman*" bar then existed – which appears undisputed -- is misrepresented by Respondents. *See infra*. More, the district court's reluctance to address the clear absence of due process in State proceedings and urgency for R. 15 medical examination prevented any just remedy. Instead, regrettably, this promoted the State's disinterest in legitimate proceedings in a dispute in which local attorneys had acted in violation of our Constitution.

- Respectfully, there does not exist "*unfair prejudice*". The individual Respondents remain in the local community and remain available to address their conduct before a jury.

- "*Void judgment*" remains meritorious. *See infra*.

- Real damages have been plead. All 3 Federal pleadings alleged facts in support of *fraud* and *undue influence*, *i.e.*, grounds for will contest concerning a will which Petitioners remained unaware for years had been changed.

- Notably, upon years of review, none of the Respondents -- even here or any State court -- ever has written/ mentioned "*Dr. Zesiger*" evidence or the *Medical Certificate Statute*. Why do all Respondents avoid this? This is neither fair nor credible. "*Abstention*" lacks merit.

I. Federal Pleadings/ Proceedings Support Grant of Writ

The Complaint dated 4.29.99 alleges in part:

¶...[Petitioners...2/4/99 Probate certification]:

(v)..direction for ...medical examination by..Dr. K], ..., in accordance...*Medical Certificate Statute*,

(vi)..tape recordings ..evidenced..denial of due process/equal protection.. right of access to courts...:

[6/29/98 proceedings]

(ii) Judge Wilson … suggestion that Hortense "change her will" so that Petitioners .. pay BR&G's counsel fees – notwithstanding substantial evidence of pervasive undue influence, fraud, and isolation of Hortense by Schroder, Rev. Ives, BR&G, Corash …others;

(iv) Judge Wilson proposes that Judge Perlman hear the case as "Judge Perlman" as well as participate as … [*GAL*]; …

(viii)…[BR&G]'s insistence…Rev. Ives'… as "overseer", *i.e.*, *de facto* guardian;…

(x) … throughout this "hearing" there is frequent laughter…at Petitioners' expense;…an absence of mention of Schroder's 6-month campaign to obtain...$85,000 gift/ loan…;

[10/2/98 proceedings]

(iv)…Judge Dunphy stated that Judge Perlman "could not be a part of a trial"; Petitioners'… request that the case be transferred to Boston, …, for re-assignment to a fair and impartial judge…unmentioned, as well unmentioned … alternative request …remain at Northampton …."visiting judge" … unacquainted…

¶… March 8, 1999,..[Petitioners] sought relief..grounded..bias:

(vii) … trial "bifurcation" limited to "competence" establishes …prejudice – *i.e.*, absent…timely satisfaction of…*Medical Certificate Statute*, …[Petitioners] …not have any ability to have…"day-in-court" upon…sole issue…"trial", *viz.*, "competence"; ….

(x) Judge Sacks'...denial of right of access...upon ... non-implementation of...*Medical Certificate Statute*.. denial of ...[Dr. K's] examination..

¶ Pursuant to notices ...[Petitioners] sought to take ...depositions of...First Ass't, Judge Perlman .. ..[O]rder dated March 16, 1999 ...prejudicially directed (i) trial ... June 1, 1999, solely upon ... "bifurcated" issue of "competency", (ii) Judge Perlman's trial attendance ..., and directed trial testimony upon "competency", (iii) ...preclusion of all witnesses to...[Petitioners],...excepting Dr. Fleitman, notwithstanding that Dr. Fleitman's "Medical Certificate(s)" as of June 1, 1999, will be in excess of 14 months old, *i.e.*, statutorily inadmissible to support... Petition,...and (iv) authorizing the testimony of "Dr. Shirazi".

¶...[O]n March 18, 1999, .. [Petitioners] filed an Amended Petition.., which seeks completion of a Medical Certificate in statutory compliance with the *Medical Certificate Statute*"; ...

¶... [Petitioners]..[on] March 27, 1999, presented objection..:

(i) Dr. Zesiger's first examination of Hortense on April 6, 1998, i.e., ...3.. days prior to the "unrecorded" April 9, 1998 Hearing at which Rev. Ives, First Churches, Corash and BR&G... appeared absent any written evidence or papers in opposition, contending Hortense's "competence", demanding appointment of a ... [GAL] and further medical evaluation, ...;

(iii) Dr. Zesiger's concluding 12/11/98 examination at which mentation observed as "markedly decreased memory" ..., nonetheless, further reevaluation/ revisit not scheduled for six (6) months – *i.e.*, subsequent to Judge Sacks' ordered June 1-3, 1999, trial; ...

(v) Dr. Zesiger's ...letter dated March 4, 1999, to BR&G ... inquiry, in which... Dr. Zesiger certifies that Hortense requires ... [24] hour a day care, ...[7] days a week ... very

high risk of grave bodily harm … from falls, otherwise, certainly in a nursing home.

Transcript: District Court, 5.27.99:

Court ..[W]e can't decide whether or not they've had a fair hearing until we've seen how the entire state judicial system works in dealing with the case.

Petitioner My difficulty is – will come about… To have a *Rooker-Feldman* bar placed in the case through the adjudication at a trial determining competency because there's an inability to demonstrate incompetency, absent a medical certificate within 30 days of the decree [*i.e.*], a medical examination leading to a medical certificate within 30 days of a decree, a petitioner is unable to establish incompetency. I have been denied that …--…

Court ..[E]ven assuming that I have the power.., I can't make that determination until I've seen how the state judiciary actually treats this, what happens on appeal.

Petitioner My concern – you wouldn't have any jurisdiction, judge …

My concern is you might well not have jurisdiction. *Rooker-Feldman* is a bar --

Court That may or may not be the case, but this much is clear: that there can be no fair evaluation of what's transpired in the state courts without a resolution of the appellate rights. …

Amended Complaint dated 6.23.99:

¶ ..[T]ape ..evidences …[initial] hearing on April 9, 1998 …:

…

(e) BR&G ... did not address Dr. Zesiger's examination ... which had occurred ... 3 ... days earlier ... -- ...must have been known to BR&G, Rev. Ives/ First Churches/ Corash and Schroder;

(f) rather, BR&G ... alleged that Hortense had lost confidence ...in... Bowen [after 40 years] ... that Hortense had sought Rev. Ives ... Corash ... to replace Bowen, ... and that Rev. Ives wanted to be ... financial manager ... that a bookkeeper ... retained by Corash ..., and that Rev. Ives sought to oversee visitation by ... "VNA" ...;

(g) Dr. Zesiger's ... April 6, 1998, ... report of ... declining ... capacities ..., remained unmentioned, rather, ... Corash contened ... Hortense ... fine ...;

(h) BR&G ... contended ... temporary conservator... that Hortense wanted Rev. Ives ...BR&G ... sought ... prompt production of Hortense's will ....;

(i) Hortense did not appear ... not occur any request ... (i) Hortense be in attendance, ... (ii)...Dr. Fleitman complete the March 31, 1998, examination which Schroder had precluded ...7 ... days subsequent to BR&G's ... represented March 25, 1998, retention as counsel for Hortense – retained "through" Corash; ...

(k) ...BR&G .. requested an additional investigation by mental health evaluator with BR&G's input -...; ...

¶ Upon such identified First Ass't's and BR&G's ... improper conduct, ... thereby Rev. Ives/ First Churches, Corash, Schroder and BR&G ... were enabled (i) to prejudice ... [Petitioners] in the guardianship proceeding and (ii) to prejudice ... [Petitioners'] constitutionally protected rights to jury trial upon fraud and undue influence concerning identified subsequent legal proceedings....

¶ ...[The 6/1/99] trial,...[The Proposal];...

¶ ... [A]t .. 5:00 p.m., .. Judge Sacks in great haste had left the Bench notwithstanding that...enforcement of.. trial subpoenas

upon Hortense and.."Dr. Shirazi" remained undecided and that ... [Petitioners] had not rested ...case, including the testimony of Dr. Fleitman and...[his] examination of Hortense during the period June 2-3, 1999, so as to provide compliance with the *Medical Certificate Statute*. ....

¶ [T]here have occurred violations of..[Petitioners'] due process/ equal protection ...and right of access to courts...: ...

(ii) through bifurcation there occurred facilitation of ...non-production of evidence ... relating to bias, impropriety by judicial officials and others, conflicts of interest, favoritism...misrepresentation, and...issues relating to undue influence and fraud, by/ between/ among the ... [Respondents] in the small Northampton community – especially legal community; ...

Petitioners' Motion to Circuit Court 2.14.2000

Rooker-Feldman: Not a Bar to Claims

...[Petitioners] promptly sought *vacatur ab initio* of the [Probate Court] *Decree of Dismissal* grounded upon bias and bad faith. Thus, substantively, ...[Petitioners] assert absence of *Rooker* preclusion grounded upon "**void judgment**" as recently as ... [Petitioners'] memorandum to the district court [9.20.99] ... [Petitioners] addressed the "void judgment" exception ...[citing] *Fielder v. Credit Acceptance Corporation*, 10 F. Supp.2nd 1101, at 1104 (W.D. Mo. 1998) ("*federal court may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake*"). [Citations omitted.]

II. Petitioners' Supplemental Complaint Meritorious: Real Damages Alleged

Leave to file a supplemental pleading is granted, absent prejudice. *See Quarantino v. Tiffany & Co*., 71 F. 3rd 58, 66 (2nd Cir. 1995); *see also, Keith v. Volpe*, 858 F. 2nd 467,

473-74 (9th Cir. 1988) (R. 15 (d) use "*favored*", not require "*same transaction*" but "*some relationship*"); *Weeks v. New York*, 273 F. 3rd 76, 88 (2nd Cir. 2001) ("*[t]he threshold consideration ... is whether the supplemental facts connect [the supplemental pleadings] to the original pleadings*"). Motion for supplemental pleading is considered upon same factors as motion to amend pleading under R. 15 (a). *Klos v. Haskell*, 835 F. Supp. 710, 715 (W.D.N.Y. 1993), *aff'd* 48 F. 3rd 81 (2nd Cir. 1995) (R. 15 (a) and (d) share same standard).

If necessary, there should be authorized amendment to the *Supplemental Complaint* so as to include a jurisdictional *ad damnum* amount upon alleged diversity jurisdiction. *See Doyle v. Household Credit Servs., Inc.*, 844 F. Supp. 13 (D. Me. 1994).[2] *Relation back* should be permitted to the date of *Complaint* filing, *i.e.*, April 29, 1999, grounded upon R. 15 (c) and R. 15 (d). The claim(s) for wrongful pre-positioned inheritance was implicit in the injury identified in the earlier pleadings, *e.g.*, absence of medical examination unfairly provided (secreted) opportunity for the individual Respondents within days to change the at least 20-year will to/ for their own financial and other benefit. This injury to Petitioners "*arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading ...*"[3] This standard is measured by the facts pleaded.

---

[2] *Doyle* quotes Wright & Miller § 1213. *Jurisdictional Amount*: "*If the allegations of the complaint clearly show the requisite jurisdictional amount to be in controversy even though no express allegation of jurisdictional amount is made, dismissal of the complaint for failure to allege subject matter jurisdiction would be unwarranted inasmuch as an amendment to correct the deficiency can be made easily and expeditiously*".

[3] *See Alpern v. UtiliCorp United, Inc.*, 84 F. 3rd 1525, 1543 (8th Cir. 1996) ("*The basic inquiry is whether the amended complaint is related to the general fact situation alleged in the original pleading*"); *Wilson v. Fairchild Republic Co.*, 143 F. 3rd 733, 738 (2nd Cir. 1998) ("*The pertinent inquiry ... is whether the original complaint gave the defendant fair notice of the newly alleged*

Allowance for *relation back* does not depend on the legal theory originally presented. *Johnson v. Crown Enterprises, Inc.*, 398 F. 3rd 339, 342 (5th Cir. 2005) (focus not on caption of claim, but on underlying facts); *Maegdlin v. International Association of Machinists and Aerospace Workers*, 309 F. 3rd 1051, 1053 (8th Cir. 2002) (new legal theory supported by identified original facts).

Here the district court's stay of all discovery on August 24, 1999, prejudicially precluded to Petitioners any ability to obtain timely evidence not only of Hortense's medical condition but also the individual Respondents' motives, conduct and secreted year-earlier purported change of will. "*Relation back*" serves the interests of justice and promotes remedy to such district court unfair and consequential stay of discovery – then, *Rooker-Feldman* dismissal with *$10,000 bond* and "*appeal appearing frivolous*" enduring prejudice. Indeed, at every meaningful occasion the State revived such wrongful and prejudicial "*Rooker-Feldman*" bar, "*appeal appearing frivolous*" and *$10,000 bond* impositions.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 18, 2007

Petitioner, *Pro Se*
DANIEL J. O'CALLAGHAN

Petitioner, *Pro Se*
ALISON E. CLAPP O'CALLAGHAN

c/o Daniel J. O'Callaghan, Esq.
7 Dey Street, Suite 700
New York, New York 10007
(212) 222-4200

---

claims"). *See Mayle v. Felix*,__ U.S. __, 125 S. Ct. 2562, 2569-75 (2005) which supports such remedy to Petitioners.